

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GERARD J. PALAZZOLO,

Defendant-Appellee.

UNPUBLISHED

August 4, 1998

No. 206480

Oakland Circuit Court

LC No. 96-143907 FC

Before: Murphy, P.J., and Young, Jr. and M. R. Smith*, JJ.

MEMORANDUM.

Plaintiff appeals by delayed leave granted the circuit court order partially granting defendant's motion to quash. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), arising out of the sexual assault of his adopted daughter. The daughter testified at the preliminary examination that defendant came into her room at night and touched her vagina with his fingers. Her testimony did not indicate any penetration. Defendant made a statement to police admitting that he penetrated his daughters with his fingers.

Defendant moved to quash the information in circuit court, asserting that the corpus delicti of first-degree criminal sexual conduct was not established by independent evidence prior to the admission of his confession. The court found that the corpus delicti of first-degree criminal sexual conduct required a showing of penetration, and partially granted the motion to quash. Defendant subsequently pleaded no contest to second-degree criminal sexual conduct.

The corpus delicti rule arose in order to prevent a defendant's confession from being used to convict him of a crime that never occurred. *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). The rule provides that a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing the occurrence of a

* Circuit judge, sitting on the Court of Appeals by assignment.

specific injury and that some criminal agency was the source of that injury. *People v Cotton*, 191 Mich App 377, 389; 478 NW2d 681 (1991). A defendant's confession may then be used to elevate the crime to one of a higher degree or to establish aggravating circumstances. *Id.*

Here, complainant's preliminary examination testimony was sufficient to establish a specific injury, which was caused by a criminal agency. Once this evidence was presented, defendant's confession was properly admitted to elevate the crime to a higher degree. *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985). The trial court erred in finding that defendant's confession was inadmissible, and in quashing the first-degree criminal sexual conduct charge.¹

Defendant argues that further proceedings below are barred by the double jeopardy clause, where he has already pleaded no contest to second-degree criminal sexual conduct and served the confinement portion of his sentence. However, this Court has held that when a plea and sentencing occur on a reduced charge, and the basis for the reduction is later overturned on appeal, jeopardy does not attach. *People v Howard*, 212 Mich App 366, 370; 538 NW2d 44 (1995).

We direct that this case be remanded to the circuit court and the original charge of first-degree criminal sexual conduct be reinstated.

Reversed. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Robert P. Young, Jr.
/s/ Michael R. Smith

¹ We decline plaintiff's invitation to abolish the corpus delicti rule in light of recent Supreme Court precedent. *People v McMahan*, 451 Mich 543; 548 NW2d 199 (1996).